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JAMES R. BROWNING

No. 899

In the Supreme Court of the United States

OCTOBER TERM, 1958

JOHN M. KEARNEY, PETITIONER

v.

THE UNITED STATES

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINIONS BELOW

The opinion of the United States Court of Claims (R. 13; Pet. App. B, p. 2a) is reported at 156 F. Supp. 928. The order of the Court of Claims overruling petitioner's motion for relief from judgment under Rule 54(b) (R. 27) is printed in Appendix B of petitioner's brief.

JURISDICTION

The judgment of the Court of Claims was entered on December 4, 1957. Petitioner's "Motion for Rehearing under Rule 54(b)" of the Court of Claims was filed on December 3, 1958. The order overruling petitioner's motion was entered February 11, 1959. The petition for a writ of certiorari was filed on May

8, 1959. The jurisdiction of this Court is invoked under 28 U.S.C. 1255(1).

QUESTIONS PRESENTED

1. Whether the right to seek review in this Court of a final judgment of the Court of Claims is restored by a motion for relief from judgment under Rule 54(b) of the rules of that court filed approximately one year after the entry of final judgment.

2. Whether the Court of Claims has jurisdiction to review a determination by a military department that an officer was not incapacitated at the time of his release from active duty.

3. Whether, if such jurisdiction exists, the Secretary of the Navy, acting through the Board for the Correction of Naval Records, acted arbitrarily, capriciously, and contrary to law and due process in determining that petitioner was physically fit to perform military duties at the time of his release from active military duty.

4. Whether a claim for disability retirement pay accrues at the time of release from active duty and becomes barred by the statute of limitations (28 U.S.C. (Supp. IV) 2501) six years thereafter.

STATUTES AND RULES INVOLVED

The pertinent statutes and rule are set forth in the Appendix, *infra*, pp. 15–17.

STATEMENT

Petitioner, a former officer in the Marine Corps, brought this suit to recover disability pay allegedly due him.

Petitioner enlisted in the United States Naval Reserve on September 2, 1942, and, on February 18, 1944, was commissioned a second lieutenant in the United States Marine Corps Reserve. On June 13, 1945, petitioner was injured, in the line of duty, in an airplane accident. Navy doctors diagnosed his injuries as a fracture of the right mandible (jaw), a dislocation of the right wrist, and contusions, lacerations, and abrasions (A, Ex. 15).[1] After hospitalization and a temporary return to duty, a Board of Medical Survey, on December 27, 1945, found that the injury to petitioner's jaw rendered him unfit for full duty, but that his condition would respond favorably to further treatment (A, Ex. 15). Petitioner, after receiving treatment at a special clinic, faced a Board of Medical Survey, again, on May 15, 1946. The Board, finding that a prosthetic device given him at the clinic had greatly improved his condition and that he had fully regained sensation in his face and neck, rendered its opinion that petitioner was fit for duty (A, Ex. 30, pp. 3–4). On May 22, 1946, a physical examination found petitioner acceptable for flying status (A, Ex. 30, p. 4). On October 17, 1946, petitioner, then a first lieutenant, was honorably released to inactive duty "not by reason of physical disability."[2]

In 1948, petitioner applied for a reserve commis-

[1] "A" refers to the 20 exhibits filed by petitioner which accompany the Record. "B" refers to the 4 exhibits filed by respondent which accompany the Record.

[2] In the year preceding his release from the Marine Corps, petitioner had 700 hours of flying time (A, Ex. 18).

sion in the United States Air Force. In connection with his application for this Air Force appointment, he was given a medical examination on October 18, 1948, by a Navy doctor at the flight surgeon's office at the Naval Air Station, Anacostia, and was found physically fit for general service (B, Ex. 1). Petitioner, having resigned his reserve commission in the Marine Corps, was commissioned a captain in the Air Force and, soon thereafter, was called to active duty. On November 22, 1948, petitioner was examined by a flight surgeon and another medical officer, and was found physically qualified for flying duty (B, Ex. 2). In his subsequent tour of duty with the Air Force, he held an office position, but received flight pay, as well, for going on flight assignments (A, Ex. 7, p. 65; A, Ex. 30, p. 13). Petitioner was released to inactive duty in July, 1950. He received another medical examination at this time, and was found, at the time of his separation from the Air Force, physically qualified for general duty (B, Ex. 3).

The Veterans' Administration awarded petitioner a 70 percent disability rating for service incurred disabilities, effective January 18, 1952, and a disability rating of 50 percent retroactive to October 1, 1948 (A, Ex. 32). The Veterans' Administration award referred to petitioner's jaw injury, his wrist injury, and also diagnosed him to have had a fracture of the left parietal region of the skull (A, Ex. 30, p. 19).

In 1952, petitioner applied to the Board for Correction of Naval Records, requesting that his record be amended to state that he had been physically disabled at the time of his release from the Marine Corps

on October 17, 1946, and that he be granted disability retirement benefits. The Correction Board wrote the Physical Disability Appeal Board (Marine Corps) asking it to review petitioner's case. The latter board replied that, since petitioner was released from active duty prior to the passage of the Career Compensation Act of 1949, 63 Stat. 816 (37 U.S.C. (1952 ed.) 272), the proper reviewing agency, under applicable Navy directives, was the Naval Retiring Review Board (Marine Corps) (A, Ex. 4). On August 28, 1953, petitioner, appearing with counsel, presented his case at a hearing before the Naval Retiring Review Board (Marine Corps). The Board rejected petitioner's claim, holding unanimously that petitioner had been fit for duty at the time of his release from active duty with the Marine Corps (A, Ex. 5, p. 14). On December 21, 1953, petitioner, again represented by counsel of his own choice, appeared before the Correction Board and received another full hearing, in which both he and Dr. Marvin Fuchs, a medical witness called by him, testified and answered questions posed by the Board (A, Ex. 7).[2] The Correction Board, consisting of three civilian members, ruled that no modification of petitioner's naval record was warranted (B, Ex. 4). The Board's decision was based on its evaluation of petitioner's many medical records, the testimony of petitioner and Dr. Fuchs,

[2] At this hearing, the Board sought to have Commander Harvey Reitz, a Navy doctor, present to assist it. When petitioner's counsel objected to Dr. Reitz's participating, the Board, without passing on the validity of the objection, asked Dr. Reitz to absent himself and the hearing proceeded (A, Ex. 7, pp. 3–4).

the findings of the Naval Retiring Review Board, an opinion from the Bureau of Medicine and Surgery analyzing the medical evidence, and applicable statutes and regulations (B, Ex. 4). It found that the injuries sustained by petitioner in the 1945 accident were:

> * * * a fractured mandible which resulted in malocclusion, contusions to the left side of the head, and carpo-metacarpal dislocation (right wrist) (B, Ex. 4, p. 3).

The Board's report to the Secretary of the Navy pointed out that, despite petitioner's claims that he had been suffering frequent incapacitating headaches since 1945, the numerous physical examinations petitioner had received since the accident had found him physically qualified for duty involving the actual control of aircraft (B, Ex. 4, p. 3). In fact, the physical examination preceding his separation from the Air Force contained explicit denials by petitioner that he had any complaints relative to headaches or migraine (B, Ex. 4, p. 3). The Board concluded that the evidence presented did not establish that petitioner, on October 17, 1946, had such defects as would incapacitate him from performing the duties of his rank (B, Ex. 4, p. 3). In 1954, the Secretary of the Navy approved the Board's decision.

On January 3, 1955, petitioner brought suit in the Court of Claims, alleging that the Correction Board and the Secretary had acted "arbitrarily, capriciously, contrary to the evidence, and without force of law", and demanding retirement pay from October 17, 1946. The Government filed a motion for summary judgment on three alternative grounds, outlined in this

brief. *Infra*, pp. 9–14. The Court of Claims, on December 4, 1957, granted the motion on the ground that the decision of the Correction Board was not arbitrary, capricious or otherwise illegal, and entered judgment in favor of the United States. Almost one year later, on December 3, 1958, petitioner, represented by a new counsel, filed in the Court of Claims what he labeled a "Motion for Rehearing under Rule 54(b)" (R. 17). The grounds for the motion were the "mistake" of petitioner's former counsel in not introducing into the proceeding the 35 exhibits on which petitioner presently relies, and "newly discovered evidence" (R. 17). Petitioner's motion was overruled summarily by the Court of Claims on February 11, 1959. Petitioner filed this petition for certiorari on May 8, 1959.

ARGUMENT

1. Petitioner, in asking this Court to consider the same contentions which the Court of Claims decided against him on December 4, 1957, is clearly attempting to circumvent the statutory requirement (28 U.S.C. 2101(c)) that a petition for certiorari be filed within 90 days after entry of the judgment sought to be reviewed. To avoid this barrier, petitioner relies on the fact that a motion, filed by him under Rule 54(b) of the Rules of the Court of Claims (Appendix, *infra*, pp. 15–16), was overruled on February 11, 1959, less than 90 days before he filed his petition for certiorari.[4]

[4] The order of the Court of Claims, overruling petitioner's motion, was applicable, by its terms, to motions made under Rules 53 and 54 by litigants in four different lawsuits (R. 27)

Although Rule 54(b) provides flexible time limits for the filing of motions, it also provides that motions made under it do *not affect the finality of a judgment or suspend its operation.* That this limitation prevents any such motion from tolling the time limitations for seeking review is made eminently clear by the decisions interpreting comparable Rule 60(b) of the Federal Rules of Civil Procedure, which has the substantially identical language. *Raughley* v. *Pennsylvania Railroad Co.*, 230 F. 2d 387 (C.A. 3); *Saenz* v. *Kenedy*, 178 F. 2d 417 (C.A. 5); *Tarkington* v. *United States Lines Co.*, 222 F. 2d 358 (C.A. 2). *Perrin* v. *Aluminum Co. of America*, 197 F. 2d 254 (C.A. 9).

Thus, review of the original judgment is barred, and the petition is timely only as to the single question of whether the Court of Claims committed an abuse of discretion in refusing to vacate its original judgment.[5] *Saenz* v. *Kenedy, supra; Smith* v. *Kincaid*, 249 F. 2d 243 (C.A. 6); *Tarkington* v. *United States Lines Co., supra; Rutland Transit Co.* v. *Chicago Tunnel Terminal Co.*, 233 F. 2d 655 (C.A. 7). In view of the grounds which petitioner urged in support of his motion, this contention is obviously untenable. Petitioner's motion sought to reopen the proceeding on the basis of evidence which was neither new, newly

(Pet. App. B, p. 5a). The motion made by petitioner in the instant case was clearly one under Rule 54(b) since reference to that rule was made on the face of the motion. In fact, petitioner's motion could not have been made under Rule 53, which requires the filing of motions within 30 days after the entry of judgment, since it was not filed with the Court of Claims until almost a year after judgment had been entered.

[5] A contention which the petition does not raise.

discovered, nor omitted from the prior proceeding by excusable neglect. The only justification advanced for the earlier failure to introduce the 35 exhibits is that petitioner's former counsel was mistaken as to the proper course to pursue in presenting petitioner's case (A, Ex. 2), a justification which, in the absence of a convincing explanation for the lack of diligence, is not contemplated by the rule. *Rutland Transit Co.* v. *Chicago Tunnel Terminal Co., supra; Benton* v. *Vinson, Elkins, Weems & Searls,* 255 F. 2d 299 (C.A. 2), certiorari denied, 358 U.S. 885. In any case, a review of the Court of Claims' accurate recital of the facts and succinct evaluation of the evidence discloses that the court was fully aware of the relevant facts when it granted the motion for summary judgment (Pet. App. B, p. 2a). As "newly discovered evidence" of the Correction Board's unlawful actions petitioner makes reference to a letter which his former counsel had found in the files of the Board three years before the Court of Claims' decision (A, Ex. 2). This allegedly sinister document is nothing more than a letter from the Bureau of Medicine and Surgery to the Correction Board, analyzing the medical evidence in the case (A, Ex. 9).

Since the Court of Claims did not commit an abuse of discretion in refusing to alter its decision on the basis of the grounds presented in the motion, this petition should be denied without consideration of the argument therein.

2. We have previously urged in the Court of Claims, and in a prior petition for certiorari in this

Court, that the decision as to whether military personnel have been properly retired for physical disability is a matter entrusted by Congress to the armed services under proceedures established by statute and is not subject to review in the courts. See petition for a writ of certiorari in *United States* v. *Suter*, No. 620, October Term, 1957. The Court of Claims has not accepted this view and does not do so in this case. In the event that certiorari should be granted here, the Government would seek to support its action in this case, as it did in the court below, on the ground that the determination as to the officer's physical ability to perform his military duties is not reviewable in the courts. We do not argue the point further since we believe the Court should deny certiorari for the other reasons herein set forth.

3. Even if the court below had jurisdiction over the issue, the records presented by both parties as exhibits clearly indicate that petitioner's claims that the Board for the Correction of Military Records* acted arbitrarily and violated his constitutional rights are ill-founded. As the court below pointed out (Pet. App. B, p. 4a), the evidence in this case is overwhelmingly in favor of the Board's finding. In fact, the petitioner has himself denied the existence of continuing injury; when he sought a military appointment or flight duty, with its attendant flight pay, his medical history listed "no defects", "no present complaints", and "no prosthetic appliances" (B, Ex. 1, 2).

*The Board was established pursuant to Section 207 of the Legislative Reorganization Act of 1946, 60 Stat. 837 (5 U.S.C. 191a) (Appendix, *infra*, pp. 16–17), now codified as 10 U.S.C. (Supp. IV) 1552.

These medical records, in conjunction with petitioner's activities in the Air Force, strongly support the Board's findings. The contrary determination of the Veterans' Administration, administering a different law, was in no way binding on the Board.[1] *Rhea Smithson Johnson* v. *United States*, 138 Ct. Cl. 81; *Holliday* v. *United States*, 128 Ct. Cl. 647. Petitioner, seeking to establish that the Navy did not properly examine his physical condition, alleges repeatedly that the Navy took no X-rays of his skull. His reliance on this accusation is inconsistent with other assertions made by both himself (A, Ex. 7, pp. 53–54) and his medical witness (A, Ex. 7, p. 20) that X-rays would not be useful in revealing the injury to his brain. In any event, it seems that the Board had before it the record of an X-ray of petitioner's skull performed by the Air Force on January 9, 1950 and that this X-ray revealed no abnormalities (A, Ex. 7, p. 53). Dr. Fuchs, petitioner's medical witness at the hearing before the Board, had only been treating petitioner since 1951 and, admittedly, could give no opinion as to petitioner's fitness for duty on October 17, 1946. As he stated (A, Ex. 7, at p. 21):

> Dr. FUCHS. * * * I have given no opinion as to whether he was in 1948 fit for military service.
>
> Mr. PONS. Or 1945 or 1946?
>
> Dr. FUCHS. Or 1945 or 1946.

[1] 34 U.S.C. 417 (Appendix, *infra*, p. 16) requires that the officer be incapacitated at the time of release from active service and the incapacity must be of such character as to disqualify the officer absolutely for duty. *Lemly* v. *United States*, 117 Ct. Cl. 365; *San Milian* v. *United States*, 139 Ct. Cl. 485.

On this record, the Board's determination can hardly be called arbitrary, capricious, or contrary to law. Petitioner, claiming that the Secretary of the Navy and the Correction Board adopted procedures violating due process,* relies on the holdings of this Court that, where an individual is entitled to a hearing, he must receive due notice, have an opportunity to be heard, and be confronted by the evidence against him. Yet, although the statute creating this Board does not require that a hearing be given (Appendix, *infra*, pp. 16–17), *Wales* v. *United States*, 130 F. Supp. 900 (Ct. Cl.), the undeniable fact is that petitioner received a hearing which covered 79 pages of transcript and in which he was represented by counsel and presented witnesses (A, Ex. 7). Petitioner's attack is largely directed at the fact that the Board considered an opinion of the Naval Retiring Review Board and two letter from the Bureau of Medicine and Surgery, which were not shown to petitioner at the time of the hearing. Significantly, he does not allege that this practice was not authorized by the departmental regulations establishing the Board. The statute specifically declares that the respective Secretaries shall prescribe the procedures to be used by the Correction Boards (Appendix, *infra*, p. 17). The regulations of the Department of the Navy establishing this Board provide (32 CFR § 723.6(2)):

> Whenever, during the course of its review of the case, it appears to the Board's satisfaction

* This contention was not raised in the Court of Claims, either in the complaint (R. 1) or in the motion under Rule 54(b) (R. 17).

> that the facts have not been fully and fairly disclosed by the records or by the testimony and other evidence before the Board, the Board may require the applicant to obtain, or the Board may obtain, such further information as it may consider essential to a complete and impartial determination of the facts and issues.

Certainly, due process does not require that the Board should rule, in this nonadversary proceeding, on technical medical issues without the advice of impartial medical authorities. The letters complained of consisted of nothing more than evaluations by Navy doctors* of the medical evidence presented, which evaluations were considered by the civilian Board in conjunction with the other materials before it (B. Ex. 4, p. 2), cf. *Robertson* v. *Chambers*, 341 U.S. 37. In cases such as this, the Fifth Amendment guarantees no particular form of procedure and can be evoked only to protect substantial rights, *Labor Board* v. *Mackay Co.*, 304 U.S. 333, 349–50. It is evident that the procedures, established by the Secretary of the Navy, pursuant to statute, in no way operated to infringe petitioner's substantial rights.

4. Since petitioner's claim is that he should have been awarded disability retirement pay from the date of his release from active duty, on October 17, 1946, the claim is barred by the six-year limitation in the

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*One of the letters was, apparently, prepared by the same Dr. Reitz whose assistance the Board had sought at petitioner's hearing, a fact on which petitioner, for some reason, lays great significance.

jurisdictional statute of the Court of Claims[10] (Appendix, *infra*, p. 17, 28 U.S.C. (Supp. IV) 2501). *Soriano* v. *United States*, 352 U.S. 270; *Kendall* v. *United States*, 107 U.S. 123.

CONCLUSION

This petition is untimely; the court below had no jurisdiction to adjudicate petitioner's claim, which was, in any event, barred by the statute of limitations; and the record clearly shows that petitioner's contentions have no substantial merit. The petition does not present questions warranting the Court's review.

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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JUNE, 1959.

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[10] Although it did not reach the issue in the instant case, the Court of Claims has, in its more recent cases, held that the cause of action arises from the denial of relief by the Correction Board as approved by the secretary of the service involved. See, *e.g. Sam Millan* v. *United States*, 139 Ct. Cls. 485; *Proper* v. *United States*, 139 Ct. Cls. 511. See the Government's Brief in Opposition in *Barker* v. *United States*, No. 471, October Term, 1956.

APPENDIX

* * * * * *

Rule 54(b) of the *Rules of the United States Court of Claims* (rev. 1957) provides:

> Rule 54. Relief From Judgment or Order
>
> * * * * * *
>
> (b) *Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud, etc.:* On motion and upon such terms as are just, the Court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 53(c); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order, or proceeding was entered or taken. A motion under this subdivision (b) does not affect the finality of a judgment or suspend its operation. This rule does not limit the power of the Court to entertain an independent action to relieve a party from a judgment, order, or proceeding, or to set aside a judgment for fraud upon the Court. The

relief provided by this rule shall be in addition to the relief available to the United States under Rule 53(a)(2).

* * * * * *

Section 4 of the Naval Aviation Personnel Act of 1940, 54 Stat. 864, as amended, 34 U.S.C. 855c–1, reads in part:

All officers, nurses, warrant officers, and enlisted men of the United States Naval Reserve or United States Marine Corps Reserve, who—

(1) if called or ordered into active naval or military service by the Federal Government for extended naval or military service in excess of thirty days, suffer disability or death in line of duty from disease while so employed * * *

* * * * * *

shall be deemed to have been in the active naval service during such period, and they or their beneficiaries shall be in all respects entitled to receive the same pensions, compensation, death gratuity, retirement pay, hospital benefits, and pay and allowances as are now or may hereafter be provided by law or regulation for officers, warrant officers, nurses, and enlisted men of corresponding grades and length of service of the Regular Navy or Marine Corps: * * *

34 U.S.C. 417 reads:

When a retiring board finds that an officer is incapacitated for active service, and that his incapacity is the result of an incident of the service, such officer shall, if said decision is approved by the Secretary of the Navy, be retired from active service with retired pay.

Section 207 of the Legislative Reorganization Act of 1946, 60 Stat. 837, as amended by the Act of October 25, 1951, 65 Stat. 655, 5 U.S.C. 191a, provided in pertinent part, as follows:

(a) The Secretaries of the Army, Navy, and Air Force and the Secretary of the Treasury (with respect to the Coast Guard), respectively, under procedures set up by them, and acting through boards of civilian officers or employees of their respective Departments, are authorized to correct any military or naval record where in their judgment such action is necessary to correct an error or remove an injustice, and corrections so made shall be final and conclusive on all officers of the Government except when procured by means of fraud: * * *

* * * * * *

28 U.S.C. (Supp. IV) 2501 provides:

Time for filing suit.

Every claim of which the Court of Claims has jurisdiction shall be barred unless the petition thereon is filed within six years after such claim first accrues.

* * * * * *

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